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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MANUEL A. LOPEZ, Plaintiff/Appellant, v. TUCSON UNIFIED SCHOOL DISTRICT; THE GOVERNING BOARD; ELIZABETH CELANIA-FAGEN; TINA ISAAC; LARRY McKEE; LARRY MARTINEZ; SENIDA WADE; ROBIN LARSON; and JEAN MULVANEY, Defendants/Appellees.	2 CA-CV 2011-0127 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20092853

Honorable Scott H. Rash, Judge
Honorable Michael O. Miller, Judge
Honorable Christopher P. Staring, Judge

AFFIRMED

Manuel A. Lopez
Tucson
In Propria Persona

Miniat & Wilson, L.P.C.
By Jerald R. Wilson
Tucson
Attorneys for
Defendants/Appellees

E S P I N O S A, Judge.

¶1 In this employment discrimination and wrongful termination action, Manuel Lopez appeals from a final judgment in favor of the Tucson Unified School District and certain administrators and faculty of Palo Verde High School (collectively referred to as TUSD) entered after the court granted TUSD summary judgment on some of Lopez's claims, and granted it a judgment as a matter of law on Lopez's remaining claims during a jury trial. Lopez raises a number of issues on appeal. Finding no error, we affirm.

Background

¶2 The following facts are undisputed.[1] In 2008 TUSD hired Lopez, an Hispanic man, as a long-term substitute teacher and discharged him approximately three weeks later. Lopez sued TUSD, alleging a number of claims, including wrongful discharge, breach of contract, tortious interference with contract, retaliation, hostile work environment, denial of due process, denial of equal protection, and violations of

[1]As the appellant, Lopez was required to designate all documents necessary for our resolution of this appeal. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). However, he failed to provide transcripts of any proceeding in the trial court, including the jury trial and the hearing on TUSD's motions for summary judgment and judgment as a matter of law. *See* Ariz. R. Civ. App. P. 11(b)(1). In his reply brief, Lopez claims the transcripts were unavailable because he "could not afford the costs" and moved instead to file a narrative statement of the proceedings below. *See* Ariz. R. Civ. App. P. 11(c). The motion was denied, however, as Lopez's alleged lack of funds does not make the transcripts "unavailable" under the rule. *See Romero v. Sw. Ambulance & Rural/Metro Corp.*, 211 Ariz. 200, n.1, 119 P.3d 467, 469 n.1 (App. 2005).

42 U.S.C. §§ 1981, 1983, and 1985.[2] Specifically, Lopez alleged, inter alia, that TUSD had withheld lesson plans, access to a classroom-management computer network, new textbooks, and assistance with disciplining students, and had further failed to provide warnings or "write-ups" before discharging him. The trial court granted TUSD's motion for summary judgment as to Lopez's claims for breach of contract, violation of due process, tortious interference with contract, hostile work environment, and retaliation, but denied the motion as to his remaining claims. The case proceeded to a jury trial, but after Lopez had presented his case-in-chief and rested, the court granted TUSD's motion for judgment as a matter of law as to these claims, finding that Lopez had presented no evidence of discriminatory purpose or disparate treatment and was eligible for rehire as a substitute teacher at other schools within TUSD. The court additionally found "there [wa]s sufficient evidence that [TUSD] had a legitimate nondiscriminatory reason to release . . . Lopez unrelated to [his] membership in a protected class." We have jurisdiction over Lopez's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶3 Lopez presents fifteen issues for our review.[3] TUSD argues Lopez's "notice of appeal only states that he is appealing the grant of the judgment for directed

[2]Lopez alleged a number of other claims, including, for example, defamation, "outrageous conduct," and "perjury," which were disposed of or withdrawn early in the litigation and are not at issue in this appeal.

[3]Although Lopez is appearing in propria persona, he is held to the same standards as a qualified member of the bar and "is entitled to no more consideration than if he had

verdict"[4] and therefore he "has not properly presented the items listed in the issues presented." However, Lopez's notice of appeal refers to the "final Order of March 31, 2011," which is the final judgment in this case. An appeal from a final judgment includes review of "any intermediate orders involving the merits of the action and necessarily affecting the judgment, and all orders and rulings assigned as error." A.R.S. § 12-2102(A); *see also Marquette Venture Partners II, L.P. v. Leonesio*, 227 Ariz. 179, ¶ 6, 254 P.3d 418, 421 (App. 2011) (§ 12-2102, which prescribes scope of review by supreme court upon appeal from final judgment, applies to court of appeals as well). Accordingly, the notice of appeal was sufficient to confer jurisdiction over the issues raised by Lopez.[5]

Summary Judgment Ruling

¶4 Lopez challenges certain of the trial court's legal conclusions in its ruling granting TUSD's motion for summary judgment. The entry of summary judgment is

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been represented by counsel." *Copper State Bank v. Saggio*, 139 Ariz. 438, 441, 679 P.2d 84, 87 (App. 1983). His brief largely fails to conform to the requirements of Rule 13(a)(6), Ariz. R. Civ. App. P., as he fails to support many of his issues with substantial argument and does not cite to apposite, controlling authority or relevant portions of the record. Although an appeal may be dismissed when it fails to comply with the Rules of Civil Appellate Procedure, *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 341-42, 678 P.2d 525, 526-27 (App. 1984), in our discretion we address Lopez's arguments to the extent we are able.

[4]The 1996 amendments to Rule 50, Ariz. R. Civ. P., replaced the term, "directed verdict" with, "judgment as a matter of law." 186 Ariz. LXXV (1996). Since the amendment, the terms have been used interchangeably. *See, e.g., Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, n.4, 180 P.3d 986, 992 n.4 (App. 2008).

[5]As discussed below, however, Lopez has abandoned or otherwise forfeited review of some items he includes in his Statement of Issues.

appropriate "if the pleadings, deposition[s], answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Slaughter v. Maricopa Cnty.*, 227 Ariz. 323, ¶ 7, 258 P.3d 141, 143 (App. 2011); *Miller v. Hehlen*, 209 Ariz. 462, ¶ 5, 104 P.3d 193, 196 (App. 2005). "When a moving party meets its initial burden of production by showing that the non-moving party does not have enough evidence to carry its ultimate burden of proof at trial," the nonmoving party must "present sufficient evidence demonstrating the existence of a genuine factual dispute as to a material fact." *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 26, 180 P.3d 977, 984 (App. 2008). On appeal from a summary judgment, we view the facts and reasonable inferences in the light most favorable to the nonmoving party. *Nickerson v. Green Valley Recreation, Inc.*, 228 Ariz. 309, ¶ 2, 265 P.3d 1108, 1112 (App. 2011).

Employment Contract

¶5 Lopez first argues that TUSD hired him as a long-term substitute for a fixed term between August and December 2008, and that he therefore had an employment contract and was not an "at-will" employee. He thus challenges the trial court's conclusion that "[t]he lack of a written employment contract [wa]s fatal" to his breach-of-contract claim. Section 23-1501(2), A.R.S., provides that when "the employment relationship shall remain in effect for a specified duration of time," this must be

established by a written contract. Otherwise the employment is presumed to be terminable at will. *Id.*

¶6 Below, Lopez relied upon two documents that he claimed constituted a written contract: one titled "Substitute Teacher Evaluation Procedures" and the other, "Personnel Action Form." The trial court concluded that neither document "contains essential terms such as job requirements, salary, or limitations on [TUSD]'s ability to fire [Lopez]," a finding Lopez does not challenge on appeal. Indeed, the "Substitute Teacher Evaluation Procedures" explicitly state, "At any time Human Resources believes that the services of the Sub Teacher are no longer required, he/she will be released from duty at TUSD." And the "Personnel Action Form," states only that Lopez was a long-term substitute and was discharged in August 2008 because he was "[n]o longer needed." Contrary to Lopez's suggestion, neither document provides that TUSD had hired him to work until December 2008 or for any specified duration. And he directs us to no other document that establishes a fixed term of employment. Thus, even viewing the evidence in the light most favorable to Lopez, we agree with the court's conclusion that there was no written contract that satisfied § 23-1501(2).

¶7 Relying heavily on *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985), *superseded by statute*, A.R.S. §§ 23-1501 through 23-1502, Lopez additionally suggests that even if there was no written contract, certain exceptions to the general rule of employment at will limited TUSD's right to terminate him. Paraphrasing a portion of *Wagenseller*, Lopez states in his opening brief:

> Three general exceptions to the at-will employment presumption have developed. First, the public policy exception to the at-will doctrine permits an at-will employee to recover for wrongful discharge upon a finding that the employer's conduct undermined an important public policy. . . . Second, an exception based on contract law allows an at-will employee to recover for wrongful discharge upon proof of an implied-in-fact promise of employment for a specific duration. . . . Third, courts have found an implied-in-law covenant of "good faith and fair dealing" in employment contracts and held employers liable in both contract[] and tort for breach of this covenant.

147 Ariz. at 376, 710 P.2d at 1031. But, even assuming the continued vitality of *Wagenseller* notwithstanding the enactment of § 23-1501, Lopez does not state how the facts of his case implicate any of the exceptions he cites. For example, he states that an implied-in-fact promise of employment for a specific duration can defeat the at-will presumption and can be found "in the circumstances surrounding the employment relationship, including assurances of job security in company personnel manuals or memoranda." But he does not explain how this exception applies, particularly in light of the express warning contained in the Substitute Teacher Evaluation Procedures that substitute teachers may be terminated at will. Lopez similarly fails to provide substantial argument pursuant to the other two exceptions. He therefore has not established a genuine issue of material fact or that TUSD was not entitled to judgment as a matter of law, and we accordingly find no error in the court's grant of summary judgment in favor of TUSD.

Due Process

¶8 Lopez further argues TUSD deprived him of a property right to continued employment without affording him due process in the form of a hearing. When an employee has a property right in continued employment, that right cannot be deprived without due process. *Carlson v. Ariz. State Pers. Bd.*, 214 Ariz. 426, ¶ 14, 153 P.3d 1055, 1059 (App. 2007); *see* Ariz. Const. art II, § 4.[6] But "[t]he term 'property' in the context of a due process inquiry does not refer to concessions or privileges that a state controls and may bestow or withhold at will." *Shelby Sch. v. Ariz. State Bd. of Educ.*, 192 Ariz. 156, ¶ 55, 962 P.2d 230, 242 (App. 1998). As discussed earlier in this decision, there was no written contract specifying the duration of Lopez's employment, which was therefore terminable at will. § 23-1501(2). Thus, his reliance on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 535 (1985), is unavailing because that case involved "a public employee who can be discharged only for cause." Although Lopez may have had a subjective expectation of continued employment, this alone does not create a property interest requiring due process before termination. *Shelby Sch.*, 192 Ariz. 156, ¶ 55, 962 P.2d at 242. We therefore find no error in the court's ruling.

[6]As the trial court recognized, Lopez raised a due process claim under the Arizona Constitution, but did not raise such a claim pursuant to the United States Constitution. In any event, the analysis under either provision would be the same. *See State v. Casey*, 205 Ariz. 359, ¶ 8, 71 P.3d 351, 354 (2003) (clauses in Arizona Constitution usually interpreted in conformity with similar clauses of United States Constitution); *see also Shelby Sch. v. Ariz. State Bd. of Educ.*, 192 Ariz. 156, ¶¶ 54-60, 962 P.2d 230, 242-43 (App. 1998) (no separate analysis for due process claim brought under both state and federal constitutions).

Judgment as a Matter of Law

¶9 Lopez next challenges the trial court's grant of judgment as a matter of law in favor of TUSD. We review the trial court's ruling de novo. *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty.*, 222 Ariz. 515, ¶ 14, 217 P.3d 1220, 1229 (App. 2009). Such a motion should be granted "'if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim.'" *Id.*, *quoting Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). In making this determination, as in the case of summary judgment review, "'we view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.'" *Warne Invs., Ltd. v. Higgins*, 219 Ariz. 186, ¶ 33, 195 P.3d 645, 653 (App. 2008), *quoting Shoen v. Shoen*, 191 Ariz. 64, 65, 952 P.2d 302, 303 (App. 1997). However, "[w]hen a party fails to include necessary items [from the record], we assume they would support the court's findings and conclusions." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶10 Lopez contends TUSD violated 42 U.S.C. §§ 1981, 1983, and 1985, arguing that when the permanent teacher for whom he was substituting returned, she referred certain students to the administration for discipline and received immediate attention, whereas when Lopez had referred the same students for discipline, no action was taken. Section 1981 generally mandates that all persons within the jurisdiction of the United States have the same right "to make and enforce contracts, to sue, be parties, give evidence, and to [enjoy] the full and equal benefit of all laws." In ruling on TUSD's

motion for judgment, the trial court found no evidence "of disparate treatment directed toward Mr. Lopez or that a similarly situated teacher was treated differently." Thus, this argument must fail because we lack the trial transcripts and consequently must presume the evidence supported the court's ruling. *Baker*, 183 Ariz. at 73, 900 P.2d at 767.

¶11 Lopez similarly argues he was denied equal protection under the Arizona Constitution because TUSD denied him access to textbooks and a classroom-management website that allowed teachers to track student attendance and grades, but did not restrict the access of other Hispanic teachers.[7] As a general proposition, the Equal Protection Clause requires "that the state classify reasonably and afford equal treatment to persons similarly situated." *Salt River Pima-Maricopa Indian Cmty. Sch. v. State*, 200 Ariz. 108, ¶ 9, 23 P.3d 103, 106 (App. 2001); *see also Chavez v. Brewer*, 222 Ariz. 309, ¶ 35, 214 P.3d 397, 408 (App. 2009) (Privileges or Immunities Clause of state constitution has substantially same effect as Equal Protection Clause of United States Constitution). However, when an equal protection claim is based on race, "'[p]roof of racially discriminatory intent or purpose is required'" to sustain the claim. *State v. Acosta*, 125 Ariz. 146, 151, 608 P.2d 83, 88 (App. 1980), *quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

¶12 Here, the trial court found that Lopez had presented no evidence of discriminatory purpose relating to his membership in a protected class and "no evidence

[7]We find puzzling Lopez's framing of the issue because he seems to concede that any disparate treatment he may have received was not the result of his belonging to a protected class, which concession necessarily negates his equal protection claim.

. . . of disparate treatment directed toward [him] or that a similarly situated teacher was treated differently." And because Lopez has failed to include the transcripts in the record on appeal, we must presume the evidence adduced at trial supported the court's findings and conclusion. *Baker*, 183 Ariz. at 73, 900 P.2d at 767. Accordingly, we find no error.

Discretionary Rulings

¶13 Lopez challenges other rulings of the trial court, arguing the court erred in precluding evidence of his damages as a discovery sanction, sustaining TUSD's objection to discovery of sensitive information, and considering certain of TUSD's motions that Lopez asserts were untimely. We review these rulings for an abuse of discretion. *Zimmerman v. Shakman*, 204 Ariz. 231, ¶ 10, 62 P.3d 976, 980 (App. 2003) (reviewing imposition of discovery sanctions and exclusion of evidence for abuse of discretion); *Larsen v. Decker*, 196 Ariz. 239, ¶ 6, 995 P.2d 281, 283 (App. 2000) (evidentiary rulings); *Link v. Pima Cnty.*, 193 Ariz. 336, ¶ 3, 972 P.2d 669, 671 (App. 1998) (discovery and disclosure rulings).

Disclosure of Damages

¶14 Lopez contends that he included a list of medical providers in his initial disclosure statement in November 2009 as well as a list of "medical bills and reports" in March 2010, thus complying with the trial court's order requiring damages to be disclosed by April 1, 2010. We read this as an argument that the court abused its discretion in limiting, as a discovery sanction, the evidence Lopez would be allowed to present at trial to "the statements and topics provided in [his] disclosure statements," which the court found "d[id] not disclose any specific damages." *See* Ariz. R.

Civ. P. 37(c)(1) (except for good cause, party who fails to timely disclose information required by Rule 26.1, Ariz. R. Civ. P., may not use undisclosed information at trial); *Granger v. Wisner*, 134 Ariz. 377, 381, 656 P.2d 1238, 1242 (1982) (trial court has discretion to exclude evidence as discovery sanction).

¶15 Although Lopez provides a general discussion of the propriety of awarding damages in employment disputes, he does not identify any portion of the record that establishes he promptly disclosed "[a] computation and the measure of damage alleged." Ariz. R. Civ. P. 26.1(a)(7). He points to his initial disclosure statement, but in that document, Lopez stated only, "Plaintiff is claiming the maximum allowed by laws." Likewise, he cites other filings in which he claimed certain witnesses would testify about the extent of his damages, as well as an assertion by TUSD that, although Lopez had claimed to have documentary evidence of his damages, he "never provided any such documents in connection with his various disclosure statements." None of the referenced materials supports his argument, nor does he cite to any authority that would relieve him of the duty to make this disclosure. Accordingly, we find no abuse of discretion in the court's decision.[8]

Disclosure of Student & Parent Information

¶16 Lopez also argues that TUSD violated Rule 26.1 by refusing to disclose parents' and students' names, addresses, telephone numbers, attendance, grades, and

[8]Moreover, as TUSD points out, even had the trial court erred in excluding evidence of damages, any such error would be harmless given that Lopez failed to meet his burden of proof as to TUSD's liability. *See* Ariz. R. Civ. P. 61 (error not ground for disturbing judgment unless it affects substantial rights of parties).

discipline records.[9] We interpret this as an argument that the trial court abused its discretion in sustaining TUSD's objection to the discovery request. Applying *Catrone v. Miles*, 215 Ariz. 446, 160 P.3d 1204 (App. 2007), the court determined that the information sought in Lopez's "blanket requests for personal, confidential information concerning approximately 150 children who are neither parties to the action nor related to persons who are parties" was not relevant. *See id.* ¶ 27 (court first must determine relevance of information sought). Although the court granted Lopez leave to "make a more specific showing of relevance," as TUSD points out, he never did so. On appeal, moreover, Lopez makes no attempt to show the relevance of the sought disclosure. To the extent the argument is not abandoned, *see DeElena v. S. Pac. Co.*, 121 Ariz. 563, 572, 592 P.2d 759, 768 (1979), it is without merit. We thus find no abuse of the trial court's discretion.

Timeliness of Motions

¶17 Lopez next asserts TUSD's motion in limine and "motion for judgment" were untimely, implying the trial court erred in considering the motions due to their alleged untimeliness. As to the motion in limine, Lopez failed to argue in his written objection that the motion was untimely and therefore has forfeited the argument. *See Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768 (App. 2000) (appellate courts do not consider arguments raised for first time on appeal). And the

[9]Lopez also questions whether disclosure of this information would have violated the Family Education Rights and Privacy Act (FERPA). *See generally* 20 U.S.C. § 1232(g); 34 C.F.R. pt. 99. But he fails to make any substantial argument on this point.

argument is without merit in any event. Rule 7.2(b), Ariz. R. Civ. P., requires motions in limine to be filed no later than thirty days before trial. Rule 7.2(e), however, allows the trial court to rule before trial on untimely motions in limine "for good cause shown." As TUSD points out, its trial counsel was appointed by an order filed January 7, 2011, and filed its motion five days later, on January 12, which was still twenty-seven days before the February 8 start of trial. This was sufficient cause to allow the court to consider the motion and issue a pretrial ruling pursuant to Rule 7.2(e), notwithstanding its untimeliness; we see no abuse of discretion.

¶18 Lopez also contends TUSD "did not file [its] Motion For Judgment until almost 2 months" after trial, violating the requirement in Rule 50, Ariz. R. Civ. P., that such a motion be made within fifteen days after entry of judgment. Ariz. R. Civ. P. 50(b). But Lopez's exact argument is unclear. If his contention is that the motion for judgment as a matter of law was untimely, this is patently incorrect because TUSD made the motion immediately after the close of Lopez's case, as contemplated by Rule 50(a)(1). If, as TUSD suggests, Lopez is claiming that the form of judgment was untimely filed, this also is inaccurate because TUSD filed its proposed form of judgment on February 22—eight court days after trial and thus within the ten days ordered by the court.[10] *See* Ariz. R. Civ. P. 6(a) (when time ordered by court is less than eleven days, weekends and holidays not included in computation). Finally, if Lopez is arguing that the final, signed judgment itself was filed late, he points to no requirement, nor are we aware

[10]TUSD incorrectly lists the deadline as fifteen days after trial.

of any, that the judgment itself must be filed within a certain time period of trial.[11] Accordingly, we find no abuse of discretion.

Other Issues

¶19 Lopez suggests that the trial court should have entered default against some of the named defendants because they did not attend trial and because TUSD's trial counsel failed to file notices of appearance on behalf of any defendant except TUSD itself. *See generally* Ariz. R. Civ. P. 55 (governing entry of default). Although he claims he requested entry of default below, nothing in the record provided to us supports this assertion, and appellate courts do not consider issues raised for the first time on appeal. *Englert*, 199 Ariz. 21, ¶ 13, 13 P.3d at 768. In any event, he fails develop the issue with substantial argument or citation to authority, as required by Rule 13(a)(6), Ariz. R. Civ. App. P. We therefore do not consider it further. *See DeElena*, 121 Ariz. at 572, 592 P.2d at 768.

¶20 Finally, Lopez asserts that certain statements contained in TUSD's affidavits were false and that TUSD's affiants consequently committed perjury pursuant to A.R.S. § 13-2701. As TUSD points out, however, apart from perfunctorily alleging the claim in his complaint, Lopez failed to make this argument to the trial court. In any event, to the extent Lopez argues these assertions were inconsistent with trial testimony,

[11]Lopez's citation to Rule 50 is unavailing. Rule 50(b) provides that a renewed motion for judgment as a matter of law must be filed within fifteen days of the entry of judgment. It does not specify when the judgment itself must be entered.

we have no transcript to allow us to compare them. We therefore do not examine this issue further.

Disposition

¶21 For the foregoing reasons, the judgment is affirmed. TUSD requests its attorney fees and costs on appeal, but provides no authority for granting the request; it is therefore denied. *See Roubos v. Miller*, 214 Ariz. 416, ¶ 21, 153 P.3d 1045, 1049 (2007) (requesting party required to "state the statutory or contractual basis for the award"); *Ezell v. Quon*, 224 Ariz. 532, ¶ 31, 233 P.3d 645, 652 (App. 2010) (same).

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge